

PTO/SB/21 (09-04)

Approved for use through 07/31/2006. OMB 0651-0031
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

**TRANSMITTAL
FORM**

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

Application Number	10/699,175
Filing Date	October 31, 2003
First Named Inventor	Bianchi et al.
Art Unit	3738
Examiner Name	Suzette Jaime J. Gherbi
Attorney Docket Number	MSDI-434/PC316.08

ENCLOSURES (Check all that apply)

<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/ Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input checked="" type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Return Receipt Postcard
Remarks		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Krieg DeVault LLP		
Signature			
Printed name	Gregory B. Coy		
Date	December 21, 2007	Reg. No.	40,967

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:			
Signature			
Typed or printed name	Gregory B. Coy	Date	December 21, 2007

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

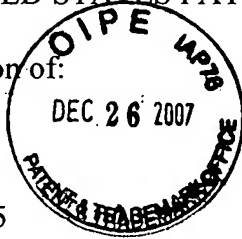
In re patent application of:

Bianchi et al.

Serial No. 10/699,175

Filed: October 31, 2003

OPEN INTERVERTEBRAL SPACER



)
) Before the Examiner
) Suzette Jaime J Gherbi
)

)
) Group Art Unit 3738
)

)
) December 21, 2007
)

**PETITION UNDER 37 CFR §1.181 FOR WITHDRAWAL OF
FINALITY OF PREMATURE FINAL REJECTION**

MAILSTOP PETITIONS

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

For the reasons set forth herein, Applicants submit that the Office Action dated November 5, 2007, is a premature final rejection, and respectfully request withdrawal of finality of the rejection. No fees are believed to be required for this request, however, if any fees are deemed necessary, please charge said fees to Deposit Account No. 12-2424, but not to include the payment of any issue fee.

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Gregory B. Coy

Name of Registered Representative

Gregory B. Coy
Signature

December 21, 2007
Date of Signature

Applicants will address the substantive assertions made in the outstanding Office Action dated November 5, 2007, separately. The purpose of this paper is to request withdrawal of the Examiner's holding of finality of the rejection. Reconsideration of the holding of finality in view of the following Statement of Facts and the following Remarks is respectfully requested.

Statement of Facts

The most recent substantive Office Action mailed by the U.S. Patent and Trademark Office in the present case is an Office Action dated November 5, 2007. The Office Action dated November 5, 2007, asserts a rejection of claims 134, 249, 269 and 292, *inter alia*, under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 6,371,988 to Pafford et al. (hereafter "Pafford"). This is a new rejection of these claims. Specifically, while other claims have previously been rejected as being anticipated by Pafford during the course of prosecution of this case, claims 134, 249, 269 and 292 have never before been rejected as being anticipated by Pafford. Moreover, Applicants did not file any amendment or information disclosure statement which necessitated the new ground of rejection. Despite asserting a new ground of rejection, the outstanding Office Action was made final.

Remarks

Applicants submit that the finality of the outstanding Office Action dated November 5, 2007, is improper. In this regard, MPEP §706.07 instructs:

Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p). (emphasis added).

In the instant case, the rejection of claims 134, 249, 269 and 292 as being anticipated by Pafford clearly differs from any previously-asserted grounds for rejecting these claims in any prior Office Action in this case, and therefore Applicants submit that it constitutes a new ground of rejection of these claims. Moreover, Applicant has not filed any amendment(s) or information disclosure statement(s) which necessitated this new ground raised in the outstanding Office Action. Accordingly, the finality of the November 5, 2007 Office Action is improper.

Closing

In view of the above, Applicants respectfully submit that the holding of finality in the outstanding Office Action is premature, and respectfully requests withdrawal of finality of same.

Respectfully submitted,

By: _____



Gregory B. Coy
Reg. No. 40,967
KRIEG DeVAULT LLP
One Indiana Square
Suite 2800
Indianapolis, IN 46204-2079
Tel.: (317) 636-4341
Fax: (317) 238-6371

KD_IM-1228176_1.DOC